UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

In the Matter of:

NICHOLSON TERMINAL & DOCK COMPANY, Case 07-CA-187907

Respondent,

-and-

STEVE LAVENDER, an Individual,

Charging Party.
_____/

RESPONDENT NICHOLSON TERMINAL & DOCK COMPANY'S EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

-and-

BRIEF IN SUPPORT OF RESPONDENT NICHOLSON TERMINAL & DOCK COMPANY'S EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

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EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent Nicholson Terminal & Dock Company ("Nicholson"), by its attorneys, Keller Thoma, P.C., files exceptions to the following rulings, findings, conclusions and recommendations of the May 16, 2018 Decision of the Administrative Law Judge Elizabeth M. Tafe in the above-captioned matter.

1. Conclusion that Nicholson's rule prohibiting employee participation in illegal strikes and lockdowns is unlawful on its face, and was not a facially neutral rule subject to the Boeing Company, 365 NLRB No. 154 (2017) analysis (ALJ Dec., p. 6) (R. Ex. 1, pp. 25-26) (Tr. 39-40). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

2. Conclusion that Nicholson's rule prohibiting employee participation in illegal strikes and lockdowns was not subject to the Boeing Company, supra, analysis as a facially neutral

rule to determine whether it could reasonably be interpreted to potentially interfere with the exercise of NLRA rights (ALJ Dec., p. 6) (R. Ex. 1, pp. 25-26) (Tr. 39-40). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

3. Conclusion that Nicholson's rule prohibiting employee participation in illegal strikes and lockdowns was not subject to the Boeing Company, supra, balancing two-part test, and the legitimate justifications testified to by Nicholson outweigh the insignificant potential impact on employee's NLRA rights (ALJ Dec., p. 6) (R. Ex. 1, pp. 25-26) (Tr. 39-40). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

4. Conclusion that Nicholson's rule prohibiting employee participation in illegal strikes and lockdowns was not subject to the Boeing Company, supra, balancing two-part test, but was a "Category 3" rule that is unlawful (ALJ Dec., p. 6) (R. Ex. 1, pp. 25-26) (Tr. 39-40). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

5. Conclusion that the Board did not rely on the Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), "reasonably construe" standard in Purple Communications, Inc., 361 NLRB No. 126 (2014), and therefore Nicholson's rule limiting employee use of company computers and the website is not affected by the Boeing Company, supra, balancing test (ALJ Dec., p. 5) (Tr. 41-44). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

6. Conclusion that Nicholson's rule limiting employees' use of the Nicholson computers and websites to business-related purposes is unlawful pursuant to Purple Communications, Inc., 361 NLRB No. 126 (2014), where that ruling is no longer valid based upon the Board's holding in Boeing Company, supra, that overruled Lutheran Heritage Village-Livonia,

343 NLRB 646 (2004) (ALJ Dec., p. 8) (Tr. 41-44). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

7. Conclusion that Nicholson's rule limiting employee use of company computers and the website is not a facially neutral rule subject to the Boeing Company, 365 NLRB No. 154 (2017) analysis (ALJ Dec., p. 8) (Tr. 41-44). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

8. Conclusion that Nicholson's rule limiting employee use of company computers and the website was not subject to the Boeing Company, supra, analysis as a facially neutral rule to determine whether it could reasonably be interpreted to potentially interfere with the exercise of NLRA rights (ALJ Dec., p. 8) (Tr. 41-44). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

9. Conclusion that Nicholson's rule limiting employee use of company computers and the website was not subject to the Boeing Company, supra, balancing two-part test, and the legitimate justifications testified to by Nicholson outweigh the insignificant potential impact on employees' NLRA rights (ALJ Dec., p. 8) (Tr. 41-44). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

10. Conclusion that Nicholson's rule providing minimal restrictions regarding working a moonlighting job as a facially neutral rule could be reasonably interpreted to potentially interfere with the exercise of NLRA rights (ALJ Dec., p. 13) (Tr. 46-47). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

11. Conclusion that Nicholson's rule providing minimal restrictions regarding outside employment would be unlawful (ALJ Dec., p. 13) (Tr. 46-47). In his June 6, 2018 Memorandum GC 18-04, providing guidance on handbook rules post-Boeing Company, General Counsel Peter

B. Robb established that such rules prohibiting employment with a competitor is a Category 1 rule. The ALJ's finding is not supported by substantial evidence on the whole record and is inconsistent with law.

12. Conclusion that under the Boeing Company, supra, analysis, Nicholson's rule providing minimal restrictions regarding working a moonlighting job "has a significant potential impact on substantial, core Section 7 activities" (ALJ Dec., p. 13) (Tr. 46-47). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

13. Conclusion that under the Boeing Company, supra, analysis, the Nicholson's justification for its rule providing minimal restrictions working a moonlighting job does not outweigh the unestablished minimal potential impact on NLRA rights (ALJ Dec., p. 13) (Tr. 46-47). This finding is not supported by substantial evidence on the whole record and is inconsistent with law.

Respectfully submitted,

KELLER THOMA, P.C.

By: /s/Steven H. Schwartz_____

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Dated: June 13, 2018

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Respondent, Nicholson Terminal & Dock Company ("Nicholson"), by its attorneys, KELLER THOMA, P.C., submits its Brief in Support of its Exceptions to the Decision of the Administrative Law Judge.

INTRODUCTION

General Counsel filed a Charge against Respondent Nicholson Terminal and Dock ("Nicholson") for the "mere maintenance" of certain common-sense rules in its employee handbook. It is undisputed that the handbook, as well as its predecessor, had been negotiated with the International Association of Machinists ("IAM"), which has represented almost all of the non-supervisory employees at Nicholson for decades. Nicholson and IAM negotiated to incorporate the handbook into their current collective bargaining agreement.

On January 4, 2018, after the hearing was closed and the parties had submitted post-hearing briefs, the ALJ allowed the parties to submit supplemental briefs, in light of the Board's ruling in Boeing Company, 365 NLRB No. 154 (2017), which overruled Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004). In Boeing, the Board ruled that its legal framework was to be applied retroactively to all pending cases. Id. at p. 11. Neither party requested to re-open the hearing.

During its Opening Statement, General Counsel withdrew the portion of the Charge that had challenged the handbook's requirements regarding posting notices, Paragraph 17. After the issuance of Boeing Company, supra, General Counsel further withdrew the portion of the Charge challenging the handbook's requirements regarding: (1) Rule #26 (maintain confidential Company or vendor information); (2) Rule III(L) (maintain confidential trade secrets and confidential information); and Rule III(N) (dress code: employees must wear appropriate attire at work). The Administrative Law Judge ("ALJ") granted General Counsel's withdrawal of these allegations in

its Order Permitting Parties to File Supplemental Briefs and Granting General Counsel's Unopposed Motion to Amend the Complaint to Withdraw Certain Allegations. Therefore, the only remaining contested rules that the ALJ ruled on are:

> #16: the prohibition against illegal slowdown, strikes or walkouts;
>
> III (Q): employees must use Nicholson's computers and website only for business-related purposes;
>
> III (V): employees must meet minimal restrictions before working in a moonlighting job; and
>
> III (X) and Appendix A: employees may not use a camera or cell phone while at work.

The Administrative Law Judge correctly recommended dismissal of the portion of the Charge related to Rule III (X) and Appendix A regarding the use of cameras and cell phones while at work, in light of the Board's December 14, 2017 ruling in Boeing Company, supra (ALJ Dec., p. 11). Boeing Company, supra, specifically addressed a "no camera" rule promulgated by that employer.

However, despite the clear direction in Boeing Company, supra, the ALJ incorrectly relied on case law now reversed by Boeing Company (ALJ Dec., pp. 5, 6, 8, 12). Instead, the ALJ should have reviewed the at-issue rules under the analysis and balancing test established in Boeing Company, supra. In Boeing Company, supra, the Board held that the first step in the analysis is whether the facially neutral rule when reasonably interpreted would potentially interfere with the exercise of NLRA rights. Boeing Company, supra, Slip Op. at 3. Upon a finding that the rule at issue could potentially interfere with NLRA rights under a reasonable interpretation, the Board instructs the application of a two-part balancing test to the rule. Boeing Company, supra, Slip Op. at 3. The two-part test requires an evaluation of: "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." Boeing Company,

supra, Slip Op. at 3. In establishing this balancing test, the Board overruled its prior ruling of the "reasonably construe" standard in Lutheran Heritage Village-Livonia, supra. The Board recognized that the prior standard resulted in confusion, and established the balancing test to provide a more structured standard for the evaluation of rules. Boeing Company, supra, Slip Op. at 11. The ALJ failed to properly apply this balancing test analysis in evaluating the contested rules.

In addition to establishing the lawfulness of contested rules, the Board established that as a result of such analysis, the Board would divide analyzed rules into three categories as an evolving resource for future evaluation and disputes of similar rules. Boeing Company, supra, Slip Op. at 3. The categories are as follows:

> As the result of this balancing, in this and future cases, the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):
>
> • *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.
>
> • *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> • *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Boeing Company, supra, Slip Op. at 3-4.

The Board's holding was clear, the balancing test was the analysis to be performed for all at-issue rules, and the categories were not an analytical framework, but would be an evolving feature as future cases were evaluated under the balancing test. The decision specifically states:

> The above three categories will represent a classification of results from the Board's application of the new test. The categories are not part of the test itself. The Board will determine, in future cases, what types of additional rules fall into which category.

Boeing Company, supra, Slip Op. at 17 (emphasis added).

In Boeing Company, supra, after establishing the new balancing test, the Board reviewed the no-camera rule that was at issue. To begin its analysis, the Board determined first whether the rule "when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights." Boeing Company, supra, Slip Op. at 17. In that particular case, after a review of the record and evaluation of the considerations outlined in its analysis, the Board held that the legitimate justifications testified to by the Boeing Senior Security Manager established the company's legitimate business justifications. Boeing Company, supra, Slip Op. at 17-18.

Additionally, the potential adverse impact on NLRA-protected activity was found to be slight in comparison to the legitimate justifications asserted by the employer. In this evaluation, the Board held that while the employees may be prevented from taking and posting a picture of their engagement in protected concerted activity, the no-camera rule had no impact on the employees' engagement in the protected activity, therefore, the exercise of Section 7 rights would not be interfered with. Furthermore, there was no allegation or evidence on the record that the no-camera rule had in fact interfered with any Section 7 activity, nor that the maintenance of the rule prevented employees from engaging in protected activity. Boeing Company, supra, Slip Op. at 19.

The ALJ disregarded the clear direction of the Boeing Company holding and failed to apply the balancing test to Respondent's rule regarding the prohibition on illegal strike activity. Instead, the ALJ ignored the balancing test in its entirety and made a conclusion that the rule was a "Category 3" rule and therefore unlawful (ALJ Dec., p. 6). The ALJ did not apply the Boeing Company analysis to the computer rule either, and instead relied upon caselaw that is not applicable to the rule at-issue here, and has been effectively overruled by the decision in Boeing Company. In evaluation of the moonlighting rule, the ALJ correctly held that the rule was subject to the balancing test, however, her application of the balancing test disregarded the employer's legitimate justifications which clearly outweighed what little potential there was for interference with NLRA rights.

Additionally, on June 6, 2018, General Counsel Robb issued Memorandum GC 18-04, Guidance on Handbook Rules Post-Boeing. This guidance was not available to the ALJ at the time of her Decision. In light of the guidance provided in this Memorandum, Rule III (V) regarding restrictions on outside employment is a Category 1 rule and should have not been found to be unlawful.

The undisputed testimony at the hearing demonstrated that each of the remaining three challenged rules were established for legitimate operational reasons and that none interfere with or have significant adverse impact on employees' Section 7 rights. It is also undisputed that since the promulgation of these rules, no employee has been disciplined or lost pay because of any violation of these rules. Further, neither the IAM nor any employee has requested clarification about the interpretation or enforcement of these rules.

In coming to these conclusions, the ALJ improperly analyzed the three at-issue rules. Instead of reviewing the rules under the balancing test established in Boeing Company, supra, the

ALJ improperly applied law that is no longer valid, and is inapplicable in light of the Boeing Company ruling. When the ALJ did review the rules under the Boeing Company balancing test, she disregarded the "balance" portion of the test and did not give proper deference to Nicholson's legitimate justifications for the rules. The ALJ's findings and conclusions that the three contested rules are unlawful are not supported by substantial evidence and is inconsistent with law, and must be reversed.

Since none of the challenged rules under a Boeing analysis violate the Act and no employee has lost income because of these rules, the General Counsel failed to meet her burden of proof.

Further, since the Administrative Law Judge failed to follow Boeing Company, supra, and followed now-reversed case law, she incorrectly held that there was a violation.

QUESTIONS PRESENTED

1. Whether the ALJ erred in the analysis of the three at-issue Employer rules in light of the Boeing balancing test? (See Exceptions 1-13)

2. Whether the ALJ erred in the failure to consider the Employer's proffered, and unrebutted, legitimate justifications for the rules at-issue? (See Exceptions 3, 9, 13)

3. Whether the ALJ erred in the analysis of the at-issue Employer rules by categorizing the rules, instead of applying the Boeing balancing test? (See Exception 4)

4. Whether the ALJ erred in applying now-reversed precedent, which is no longer valid post-Boeing, in the analysis of the at-issue rules? (See Exception 5, 6)

STATEMENT OF FACTS

(A) Background

Nicholson is a small company employing approximately forty-six employees (Tr. 26, 28). Nicholson operates terminals in Detroit and Ecorse, a nearby suburb, for loading and unloading

heavy cargo, machinery and materials for the automotive, appliance and other manufacturing industries (Tr. 25-26).

Since before the 1970s, virtually all of the non-supervisory employees at Nicholson have been represented by the IAM, or the Ship Workers Union, which merged with the IAM (Tr. 28-29). Only four non-supervisory employees are non-union; they work in offices providing clerical and administrative support (Tr. 29). The IAM-represented employees work almost exclusively outside, performing stevedoring, hi-lo or crane operations and mechanical repair duties (Tr. 27, 29).

In January 2017, Nicholson successfully negotiated a successor three-year collective bargaining agreement with the IAM, without a strike or lock-out (Tr. 30-31). That agreement included a provision adopting the Nicholson's Personnel Handbook (R. Ex. 1, p. 31; Tr. 31-32):

> The Company has issued a Personnel Handbook on September 1, 2016, outlining employment provisions. The Union acknowledges receipt of this information with the understanding that any reference to "at will" employment does not apply to seniority bargaining unit employees.

The collective bargaining agreement contains a standard Grievance Procedure, with binding arbitration as its final step, which allows employees and the Union to challenge discipline which they believe is improper (R. Ex. 1, p. 21-22). The collective bargaining agreement stipulates that the Company may enforce its work rules, but discipline may only be issued under a "just cause" standard (R. Ex. 1, p. 29-30):

> All rights which ordinarily vest in and are exercised by the Company <u>except</u> such as are specifically relinquished herein, are reserved to and remain vested in the Company, including but without limiting the generality of the foregoing . . . (i) to discipline and discharge employees for cause; (j) to adopt, revise, and enforce working rules and carry out cost and general improvement programs . . . The foregoing is subject to the express terms of this Agreement.

None of the Union's bargaining committee objected to the rules in the handbook or asked any questions about it in negotiations (Tr. 33). The Union did not file a grievance challenging any rule as unreasonable (Tr. 51). No employee has been disciplined under these rules and/or been suspended without pay under these rules (Tr. 50). No employee has asked for explanation of any rule (Tr. 54). The Union agreed to the contents of the handbook (Tr. 63).

(B) Illegal Strikes and Lockouts

The handbook prohibits employees from participating in any strike or slowdown that is illegal. The language of the handbook states (Jt. Ex. 1, p. 4):

> II. GUIDELINES FOR APPROPRIATE CONDUCT
>
> A. As an integral member of the Company's team, you are expected to accept certain responsibilities, adhere to acceptable business principles in matters of personal conduct, and exhibit a high degree of personal integrity at all times.
>
> Whether you are on or off duty, your conduct reflects on the Company. You are, consequently, encourage to observe the highest standard of professionalism at all times.
>
> Types of behavior and conduct that the Company considers inappropriate include, but are not limited to, the following:
>
> ***
>
> 16) Calling, participating in, or encouraging others to call or participate in an illegal slowdown, strike (including a sympathy strike), or walkout.

The collective bargaining agreement states (R. Ex. 1, pp. 25-26):

> The Union will not cause, or engage in, or authorize its bargaining unit employees to engage in, any strike against the Company, including any sympathy strike, nor will any employee take part in any strike, including any sympathy strike, nor take part in any sit-down, stay-in, or any other kind of strike or other interference, or any other stoppage, total or partial, or slow-down of production during the term of this Agreement. . . .

> Any employee participating in the prohibited activity set forth in this Article may be disciplined up to, and including, discharge.

The handbook merely reiterates this rule (Tr. 39). No employee has been docked pay or disciplined under this rule (Tr. 39-40).

(C) Use of Company Computers

The handbook provides that employees use their email communications for business purposes only. The language of the handbook states (Jt. Ex. 1, p. 10):

> III. GENERAL COMPANY POLICIES
>
> **Q. Computer Software Communications**
> All computers and software are owned or licensed by the Company. Therefore, access to them is restricted to employees of the Company. Any data created or transmitted via the Company's computers or through the use of the Company's software is the property of the Company. Communications are expected to be professional and for business purposes only, and messages can and will be monitored periodically. Thus, employees may not expect that their communications are private.
>
> Employees may not delete, alter, or reconfigure hardware or software in any way, nor may hardware or software be added without the express authorization of the Company Treasurer.

None of the IAM-represented employees have access to a Nicholson-owned computer, smart phone or email address (Tr. 40-41). They do not use computers to do their work (Tr. 40). The four non-union office employees do use a company computer to perform their work and are issued company email addresses (Tr. 41). No IAM-represented or office employee has access to Nicholson's website; that access is restricted to Mr. Sutka and the independent contractor that administers the website (Tr. 41). Employees are not allowed to conduct personal business on work time (Tr. 42-43).

(D) Moonlighting

The handbook provides restrictions on employees' additional employment which may cause safety concerns while performing work for Nicholson, or which may involve potential conflict by working for competitors. The language of the handbook states (Jt. Ex. 1, p. 17):

> III. GENERAL COMPANY POLICIES
>
> **V. Moonlighting**
>
> Employees are expected to devote their primary work efforts to the Company's business. Therefore, it is mandatory that they do not have another job that:
>
> - Could be inconsistent with the Company's interests.
> - Could have a detrimental impact on Company's image with customers or the public.
> - Could require devoting such time and effort that the employee's work would be adversely affected.
>
> Before obtaining any other employment, you must first get approval from the Company Treasurer. Any change in this additional job must also be reported to the Company Treasurer.

IAM-represented employees work Monday through Friday, from 7:45 a.m. to approximately 4:00 p.m. (Tr. 45). They have ample opportunity to work overtime on a voluntary basis (Tr. 45). Office employees work Monday through Friday, from 8:00 a.m. to 5:00 p.m. and also have overtime opportunities (Tr. 45). Since the inception of the moonlighting policy, no employee has approached Mr. Sutka regarding a request to work a secondary job or for clarification about the policy (Tr. 45-46). To his knowledge, no employee is actually working in a second job (Tr. 45).

Mr. Sutka testified, without rebuttal, that the purpose of the policy is to ensure employees do not work so many hours that they would be too exhausted to work their regular hours at Nicholson or that they were working for a competitor (Tr. 46-47). For example, an employee who requested to work a full shift at night as a security guard immediately before his shift at Nicholson would be denied (Tr. 46-47). Similarly, an employee who wanted to work for the Port of Toledo, which is a competitor, would be denied (Tr. 46-47). A person working a few hours after his regular shift or on the weekend would be allowed to moonlight (Tr. 47). An employee who wanted to work part-time for the IAM, or another union, would not be restricted under the policy from doing so (Tr. 47). Contrary to the ALJ's incorrect conclusion that the rule would limit an employee's association with unions, the rule does not restrict an employee from acting as a union organizer for the IAM or another union (Tr. 46; ALJ Dec., p. 14).

(E) ALJ's Decision

The ALJ's Decision found that the three rules at-issue were unlawful. However, this conclusion was a result of the incorrect analysis of the rules, instead of proper application of the Boeing Company, supra, balancing test to the at-issue rules. As to the prohibition against illegal strikes, she held, "I find that this no-striking rule is unlawful on its face, because it explicitly restricts activity protected by the Act… The Boeing balancing test, which is applied to facially neutral rules, is not implicated by this no-striking rule that explicitly restricts prohibited activity" (ALJ Dec., p. 6). For the email communication rule, the ALJ held, "[u]nder the Board's precedent in Purple Communications, the Respondent may not completely restrict the use of its email system for statutory communication by employees who have been granted access to the email system for work purposes absent a showing of special circumstances that justify such a bar" (ALJ Dec., p. 8). Last, in regard to the moonlighting rule, the ALJ applied the Boeing Company, supra balancing

test, but misinterpreted the application and found "the Respondent's justifications for this rule do not outweigh the potential impact on Section 7 rights, and therefore, the rule is unlawful" (ALJ Dec., p. 12-13).

ARGUMENT

The ALJ's Decision contains numerous erroneousness findings that are not supported by substantial evidence on the whole record and are inconsistent with the law.[1] This case involves Nicholson's mere maintenance of rules, which have not been utilized for disciplinary purposes. The ALJ failed to follow the precedent established by the Board in Boeing Company, supra. In failing to do so, the ALJ disregarded the balancing test established in Boeing Company, supra, decision in evaluating the rule pertaining to the prohibition against illegal strikes (ALJ Dec., p. 6-7). Instead, the ALJ, in direct contradiction to the Decision in Boeing Company, supra, made a conclusion that the illegal strike rule was one which fell in "Category 3" and was therefore unlawful (ALJ Dec., p. 6-7). Similarly, in the analysis of the rule regarding computer communications, the ALJ failed to attempt to apply the Boeing Company, supra, ruling, and instead relied upon now caselaw that is effectively overruled as the progeny of Lutheran Heritage, supra, to determine that this rule is unlawful. Such failure to adhere to the binding precedent of the Board in Boeing Company, supra, is a reversible error because it misapplied the law (ALJ Dec., p. 8-9). In regard to the one rule for which the ALJ applied the Board's balancing test, regarding the rule regarding moonlighting, the ALJ failed to properly apply the balancing test, and

[1] Additionally, the ALJ incorrectly found in the findings of fact that the parties' most recent previous collective bargaining agreement was in effect from February 1, 2014 to January 31, 2020 (ALJ Dec., p. 2). The most recent agreement was in fact in effect from February 1, 2014 to January 31, 2017 as indicated on the cover page of the agreement entered into the record as Respondent's Exhibit 2 (R. Ex. 2).

did not properly consider the legitimate business justification asserted by Nicholson (ALJ Dec., 13).

A. THE ADMINISTRATIVE LAW JUDGE ERRED IN HER ANALSYIS BY PLACING THE NO ILLEGAL STRIKE RULE INTO ONE OF THE BOEING COMPANY CATEGORIES.

The ALJ erred in her holding that the Nicholson rule prohibiting employees from engaging in illegal slowdowns, strikes and walkouts was "unlawful on its face" and therefore a "Category 3" rule under the Boeing Company analysis (ALJ Decision, p. 6). The ALJ's assumption that this rule is automatically unlawful on its face is a misapplication of the Boeing Company, supra, ruling. In Boeing Company, the Board established that first a rule must be evaluated based upon the balancing test, and then as a result of the application of the balancing test, there will be a determination by the Board that rules fall into one of three categories. Id., Slip Op. at 3-4.

In Boeing Company, supra, the Board held that the first step in the analysis is whether a facially neutral rule when reasonably interpreted would potentially interfere with the exercise of NLRA rights. Boeing Company, supra, Slip Op. at 3. Once such analysis has concluded that reasonable interpretation is that the rule could potentially interfere with NLRA rights, the two-part balancing test must be applied. The Board in Boeing Company, supra, Slip Op. at 3, established:

> Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy," focusing on the perspective of employees, which is consistent with Section 8(a)(1).

The Board established this two-part balancing test to consider both the effect on employees' protected rights, as well as the employer's legitimate interests that justify the promulgation and maintenance of such rules. In establishing this rule, the Board overruled its prior ruling of the "reasonably construe" standard in Lutheran Heritage Village-Livonia, supra, noting "Lutheran Heritage has caused extensive confusion and litigation for employers, unions, employees and the Board itself. The "reasonably construe" standard has defied all reasonable efforts to apply and explain it." Boeing Company, supra, Slip Op. at 11. The Board recognized that the prior standard was inconsistent with the U.S. Supreme Court's decision in Republic Aviation v NLRB, 324 U.S. 793 (1945). Therefore, it utilized the employer's legitimate business purposes that was a part of the evaluation in Lutheran Heritage Village-Livonia, supra, to establish the balancing test to provide a more structured standard for the evaluation of work rules. Id. at 5.

The Board went on to further explain that as a result of the analysis under the balancing test, the Board will divide rules into three categories as an evolving resource for future evaluation and disputes of similar rules (supra, pp. 3-4).

In Boeing Company, supra, after establishing the new balancing test, the Board reviewed the no-camera rule that was at issue. To begin its analysis, the Board determined first whether the rule "when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights." Boeing Company, supra, Slip Op. at 17. In this particular case, after a review of the record and evaluation of the considerations outlined. In its analysis, the Board held that the legitimate justifications testified to by the employer's witness established the company's legitimate business justifications. Boeing Company, supra, Slip Op. at 17-18.

Additionally, the potential adverse impact on NLRA-protected activity was found to be slight in comparisons to the legitimate justifications asserted by the employer. Id. In this

evaluation, the Board held that while the employees may be prevented from taking and posting a picture of their engagement in protected concerted activity, the no-camera rule had no impact on the employees' engagement in the protected activity, therefore, the exercise of Section 7 rights would not be interfered with. Furthermore, there was no allegation or evidence on the record that the no-camera rule had in fact interfered with any Section 7 activity, nor that the maintenance of the rule prevented employees from engaging in protected activity. Boeing Company, supra, Slip Op. at 19.

The ALJ disregarded the clear direction of the Boeing Company, supra, holding and failed to apply the balancing test at all to the rule regarding the prohibition on illegal strike activity. The ALJ's determination that the rule regarding illegal strike activity was unlawful on its face and belonged in "Category 3" was an improper application of the Boeing Company holding and the referenced categories (ALJ Dec., p. 8). As such, the ALJ's finding that the illegal strike rule was unlawful is not supported by substantial evidence and is inconsistent with law, and must be reversed.

The ALJ did not analyze this rule under the balancing test, due to her misapplication of the Board's ruling and her incorrect interpretation that the rule prohibits legal strikes (ALJ Dec., p. 6). It does not. Instead, her analysis bypasses the balancing test which would require her to evaluate the potential interference with employees' Section 7 rights, as well as the employer's legitimate justification for the rule. Mr. Sutka provided unrebutted testimony establishing the legitimate justifications for the rule (Tr. 39-40). There has been no potential interference with employees' Section 7 rights since the rule only prohibits employees' engagement in illegal activity, activity that is, by definition, not protected under the NLRA. If the ALJ had properly applied this analysis, she would have been required to acknowledge that the rule prohibits "illegal" action by the

employees, not legal pursuit of NLRA protected rights. Therefore, there is not a potential interference on employees' Section 7 rights. Furthermore, the employer's business interest in preventing illegal action is common-sense. The employer has agreed in collective bargaining with the IAM for a "no-strike" provision because the employer's business operations require its employees to be present and productive. Mr. Sutka testified without rebuttal that Nicholson operates in a highly competitive business environment (Tr. 28).

The ALJ further was stretching the language of the rule in her inference that the word "illegal" cannot be read to modify "strike" and "walkout" because it only appears directly before the term "slowdown" and not before "strike" and "walkout" (ALJ Dec., p. 6). This is farfetched. It is clear from the plain language that the Company intended the rule to apply to illegal activities, not legal activities. To call this ambiguous is to read more into the rule than is there. There is no covert attempt by Nicholson to prohibit its employees from engagement in legally sanctioned Section 7 rights. To infer otherwise, the ALJ is stretching the bounds of the language to find the rule unlawful.

In Boeing, a critical factor the Board used in justifying overruling the Lutheran Heritage standard was that some ambiguity is inherent in the interpretation of work rules:

> In many cases Lutheran Heritage has been applied to invalidate facially neutral work rules *solely* because they were ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and Lutheran Heritage fails to recognize that many ambiguities are inherent in the NLRA itself. . . .
>
> The Lutheran Heritage "reasonably construe" test has improperly limited the Board's own discretion. It has rendered unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity. It has not permitted the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur.

> Nor has Lutheran Heritage permitted the Board to afford *greater* protection to Section 7 activities that are central to the Act.

Boeing, supra, Slip Op. at 2 (underlined emphasis added; italics in original).

Despite the ALJ's stated concern, the likelihood that four, non-union clerical employees would illegally strike is slim (ALJ Dec., p. 6). As recognized by the Board in Boeing, any application of this "ambiguous" rule regarding an IAM-represented employee's participation in a "legal" strike is subject to the contract's "just cause" requirement for discipline (supra, p. 7).

Further, contrary to the ALJ's ruling, the Board specifically held that a rule may lawfully be maintained, even though it may not be unlawfully applied:

> Fifth, as indicated above, the Board may find that an employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, even though the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct. For example, if the Board finds that an employer lawfully maintained a "courtesy and respect" rule, but the employer invokes the rule when imposing discipline on employees who engage in a work-related dispute that is protected by Section 7 of the Act, we may find that the discipline constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).

Boeing, supra, Slip Op. at 11.

Therefore, the ALJ's analysis of the "ambiguity" of the rule must be reversed, because it falls under the "reasonably construed" standard of Lutheran Heritage, not Boeing's two-part balancing test.

Nicholson and the IAM agreed to the adoption of this language into their collective bargaining agreement by reference. The IAM would not have done so if there was a reasonable understanding that this language was meant to prohibit employees from engagement in sanctioned Section 7 activity (Tr. 63). This misreading of the language by the ALJ reads into the language of the rule meaning that (1) does not exist, and (2) is not reasonably interpreted to exist by the

employees and the bargaining unit representative of the employees. As Mr. Sutka testified, without rebuttal, there has been no question regarding the language of the rule (Tr. 53-54). No employees have reasonably inferred that this rule is meant to prohibit employees from engagement in Section 7 activity. The ALJ took liberty in her over analysis of the terms of the rule, but failed to properly evaluate the rule under the Boeing Company, supra, balancing test. Therefore, the ALJ's conclusion that this rule is unlawful is not supported by substantial evidence on the record and is inconsistent with the law.

B. THE ADMININISTRATIVE LAW JUDGE MISINTERPRETED THE BOARD'S RULING IN BOEING COMPANY, SUPRA, THEREFORE, THE ALJ COMMITTED REVERSIBLE ERROR BY FINDING AN 8(a)(1) VIOLATION.

The Administrative Judge misinterpreted the Board's ruling in Boeing Company, supra, in application to the rules at-issue here. In the Boeing Company, supra, ruling the Board established that facially neutral policies and rules would first be evaluated to determine if there is potential interference with NLRA rights, and that the Board would balance the potential impact on NLRA rights with the employer's legitimate justifications. As a result of the Board's analysis of such facially neutral policies, etc., the three categories of employment policies will develop based upon the application of the balancing test to the rules. The ALJ completely misinterpreted the Boeing Company balancing test in application to the three work rules which she found to be 8(a)(1) violations. The ALJ's analysis in part relied upon her own placement of the work rules into the categories delineated by the Board, which is a result not of the application of the balancing test as provided in Boeing Company, supra, but instead a circumvention of that analysis. This is reversible error in the ALJ's ruling.

1. Illegal Slowdowns, Strikes and Walkouts

The ALJ's finding of the "illegal strikes" rule as unlawful misinterprets the Boeing Company holding, and fails to analyze the rule under the balancing test, including an evaluation of the employer's "legitimate justifications associated with the rule." The ALJ improperly determined that this rule was automatically unlawful and did not apply the balancing test analysis under Boeing Company, supra (ALJ Dec., p. 6). Instead the ALJ used caselaw that is effectively overturned by the Boeing Company, supra, decision in making the finding that the rule is unlawful. The ALJ wrongly evaluated this rule, and should have held that under a reasonable interpretation, there is not potential interference with the exercise of NLRA rights.

What the ALJ refers to as the "no-striking" rule is Nicholson's rule prohibiting employee participation in illegal strikes and lockdowns. The ALJ's finding that this rule is unlawful on its face fails to recognize the use of the word "illegal" (ALJ Dec., p. 6). The key to this rule is the term "illegal" which the ALJ summarily dismissed, and did not use in her evaluation of whether the rule was facially neutral. The Company's rule prohibits illegal actions, not legal actions, therefore it is a facially neutral rule. As such, the ALJ should have evaluated this rule pursuant to the two-part balancing test established in Boeing Company, supra, and her failure to do so is a reversible error.

The ALJ's finding that this rule is unlawful on its face fails to recognize the use of the word "illegal." Under the Boeing Company analysis, the ALJ should have done an evaluation of (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. Under the Boeing Company analysis the nature and extent of the potential impact on NLRA rights must first be evaluated. The rule prohibits employee engagement in illegal actions, which has no potential impact on NLRA rights because illegal actions are not NLRA

sanctioned rights. Cowin and Co., 322 NLRB 1091, 1093 (1997) ("If … conduct constituted an illegal or unlawful strike, then I don't think there's any dispute from the parties that his conduct would not be protected by Section 7 of the Act").

The collective bargaining agreement reflects the IAM's quid pro quo bargain with Nicholson—the Union will not strike and the Company will not lock out (R. Ex. 1, pp. 25-26). Since under the collective bargaining agreement, an employee cannot participate in a strike, sympathy strike or walkout slowdown—legal or illegal, no reasonable employee could expect to participate in an illegal strike, sympathy strike, slowdown, walkout. Therefore, this rule does not chill employees' Section 7 rights. Mr. Sutka explained:

> Q. Respondent's Exhibit 1, I believe, is the current contract. Does that have language about strikes and lockouts?
>
> A. Yes.
>
> Q. Can employees strike without union approval under the contract?
>
> A. I don't believe so, no.
>
> Q. Joint 1 has a rule against illegal strikes, walkouts, and slowdowns. What's the purpose of that rule?
>
> A. It's a reiteration of what's in the collective bargaining agreement.

(Tr. 39-40) (emphasis added).

The handbook reiterates this collectively bargained rule (Tr. 39). No employee has been docked pay or disciplined under this rule (Tr. 39-40).

Since under the collective bargaining agreement an employee cannot participate in a strike, sympathy strike or walkout slowdown—legal or illegal, employees cannot participate in an illegal strike, sympathy strike, slowdown, walkout. Therefore, this rule does not chill employees' Section

7 rights. Since the employer cannot perform its fundamental business function—loading and unloading cargo—if employees strike or walk out, it has a legitimate business justification for this rule. Further, by definition, prohibiting illegal activity, such as participating in an illegal strike, is a legitimate work rule.

2. Use of Company Computers

The ALJ's finding of the rule regarding use of electronic equipment as unlawful misinterprets the Boeing Company holding, and fails to properly evaluate the employer's "legitimate justifications associated with the rule." Instead of applying the balancing test under Boeing Company, supra, the ALJ erroneously applied the Board's holding in Purple Communications, Inc., 361 NLRB 1050 (2014) to the present case (ALJ Decision, p. 6). The Board's holding in Purple Communications, supra, is no longer good precedent due to its implied reliance upon Lutheran Heritage, supra, which was overturned by the Board in Boeing Company, supra.

In Purple Communications, supra at p. 9, the Board adopted "a new analytical framework for evaluating employees' use of their employer's email systems". That "new analytical framework" of facially neutral work rules of employees' access of employers' email systems is inconsistent with Boeing Company, supra. Boeing Company provides an "analytical framework" that applies to all facially neutral work rules, and does not provide a limited exception for work rules applied to employer email systems.

The ALJ incorrectly ruled that the Board "has established distinct approaches" to rules regarding electronic equipment and email addresses in Purple Communications, Inc., supra and Boeing Company, supra. This is incorrect since it ignores that Boeing Company applies a balancing test for all types of facially neutral rules. The Boeing "analytical framework" requires

as one part, analysis of the employer's legitimate business reasons; Purple Communications creates a presumption that employees may use employers' email systems, unless the employer shows "special circumstances" to overcome that presumption. Purple Communications, Inc., supra, p. 2, 6). Boeing Company applies a less rigorous standard than Register Guard, 351 NLRB 1110 (2007), which was overruled by Purple Communications, which authorized a total prohibition of use of an employer's computer system, without any demonstration of a business justification. Then-Board Member Miscimarra's analysis in dissent in Purple Communications is comparable with his majority opinion in Boeing Company, supra, indicating that the Board effectively overruled Purple Communications when it issued its ruling in Boeing Company, supra.

Furthermore, the ALJ's analysis under Purple Communications, Inc., supra, is flawed. If the ALJ were to properly analyze under the standard established in Purple Communications, Inc., supra, the ALJ would have acknowledged that Nicholson can rebut the presumption allowing access to the employer's email system due to the necessity to maintain production, therefore restricting the employees' access. As the ALJ correctly found, the "outside" employees do not have company email and need not be granted the same (ALJ Decision, p. 8). However, what the ALJ failed to acknowledge is that the employer's small number of statutory employees with company email access, just four clerical employees, requires for productivity purposes that the employees be limited in their use of their company email to only business purposes (Tr. 29). Any impact of requiring employees to use private email communications, rather than personal devices and email addresses provided by Nicholson is, under a Boeing analysis, "comparatively slight".

Instead, the ALJ should have determined whether or not this facially neutral rule when reasonably interpreted would potentially interfere with the exercise of employees' NLRA rights. If the ALJ made the conclusion that the rule could be so interpreted, she must perform an analysis

under the Boeing Company two-part balancing test, taking into account the employer's legitimate justifications.

The ALJ's finding that Nicholson's rule regarding use of electronic equipment is unlawful is a flawed in its analysis of the rule because the ALJ failed to evaluate the rule under the Boeing Company, supra, ruling (ALJ Decision, p. 8). Instead, the ALJ found that pursuant to the Board's holding in Purple Communication, supra, that the rule was an unlawful restriction. It is clear the proper analysis is under the Boeing Company, supra, decision, not Purple Communications. Under the Boeing Company, supra, decision the rule on its face is facially neutral, and does not potentially interfere with the exercise of NLRA rights. Such a rule does not restrict employees from using their own personal email addresses. Furthermore, the company only issues company email addresses to its four clerical employees. Even if the two-part balancing test is to be evaluated, there is such minimal potential impact on NLRA rights, and the unrefuted employer testimony establishing the legitimate justifications, productivity, outweighs any possible interference (Tr. 42).

The record establishes that since such electronic equipment is not provided by the employer to outside (non-office) staff and they do not have access to the office electronic equipment, such a challenge is baseless and has no impact on their Section 7 rights (Tr. 40-41). These outside employees do not have access to the Company's website or Company email addresses (Tr. 41). For inside (office) staff, the Company has legitimate reasons for its work rules—the equipment is to be used solely for work-related purposes to maximize productivity. Mr. Sutka testified:

> Q. Why do you have a rule, the rule relating to the use of computers relating to those employees, inside employees?
>
> A. So that appropriate use of the company equipment is taking place, productivity. We want them doing work on the computer that's necessary business.

Q. Are they allowed to do their own personal business during company time?

A. Not necessarily, no. No.

Q. Do the office employees that are non-management, do they have smartphones provided by Nicholson?

A. Do not.

Q. Do they have any cell phones provided by Nicholson?

A. Do not.

Q. Do they have email addresses provided by Nicholson?

A. Yes.

Q. Under the handbook, what are they allowed to use those email addresses for?

A. For business communication with customers, vendors, fellow employees, business purposes.

Q. Under the handbook, can they use the Nicholson email addresses for personal business?

A. No.

Q. Why not?

A. We like to utilize that for business purposes alone, for productivity sake and proper business use.

(Tr. 41-44).

Nicholson does not provide IAM-represented employees with computers (Tr. 40-41). It does not provide any Union employee with either an email address or a smart phone (Tr. 40-41). Therefore, there is no company-provided electronic equipment for them to discuss work-related concerns; thus, this rule has no practical effect on them.

Logic dictates that a rule that electronic equipment (computers, email addresses, smart phones) be used solely by inside (office) employees for work productivity is a legitimate business justification. Such a rule has no impact on these employees' Section 7 rights. The rule does not prohibit them from using their personal computers, smart phones and email addresses from communicating with each other during non-working periods. The rule also does not prohibit them from discussing work-related concerns on their own private computers, smart phones or email addresses. Personal email addresses are readily available at no cost, through a computer tablet or smart phone. These devises are now nearly universally used by most American workers. Therefore, they have ready access to communicate with each other through their own personal devices, during non-work time.

Mr. Sutka's unrebutted testimony is that office employees should use electronic equipment only for work-related purposes (Tr. 40-41). The rule does not chill the outside or inside employees' Section 7 rights, since they can freely communicate using their personal email addresses and electronic devices. Therefore, under the Boeing standard, it is lawful.

3. Moonlighting

The ALJ's finding of the "no moonlighting" rule as unlawful misinterprets the Boeing Company holding, and fails to properly evaluate the employer's "legitimate justifications associated with the rule." The ALJ properly determined that this rule was facially neutral, and therefore, she must perform an analysis under the Boeing Company two-part balancing test. However, the ALJ's finding that "the Respondent's justifications for this rule do not outweigh the potential impact on Section 7 rights, and therefore, the rule is unlawful" is a result of her misinterpretation of the employer's rule and the Boeing Company, supra (ALJ Dec., p. 12-13).

The ALJ wrongly evaluated this rule, and should have held that under reasonable interpretation, there is not potential interference with the exercise of NLRA rights.

The ALJ's holding that "Respondent's justifications for this rule do not outweigh the potential impact on Section 7 rights, and therefore, the rule is unlawful" misinterprets the Boeing Company decision (ALJ Dec., p. 13). There is nothing in this rule that would allow a reasonable interpretation of potential interference with NLRA rights. Nicholson's "moonlighting" rule does not restrict the engagement of employees in protected activity, and a reasonable interpretation does not find that. In fact, despite the ALJ's continued reference to the rule as the "no moonlighting" rule, it should be noted that the rule does not restrict all moonlighting. Instead, the rule provides the guidelines under which an employee is restricted from moonlighting (i.e., working for competitors or in a way that would potentially prevent the employee from safely fulfilling performance of his duties for Nicholson).

Mr. Sutka's testimony was undisputed that no IAM-represented employee is working in a second job or that any employee asked to work in a second job (Tr. 46). His testimony is also undisputed that no employee, union or non-union, has been denied by management to work in a second job (Tr. 46).

Mr. Sutka explained the reason for the rule regarding moonlighting and expressly testified that union organizing would not be a basis for denial by the company:

> Q. What's the reason for having the rule about moonlighting?
>
> A. We need our employees sharp and available. We are a volume driven, seasonal business. And we would like to know if somebody has a job that might not be compatible with a full-time role at Nicholson Terminal.
>
> Q. What would not be compatible?

A. Well, working for another customer would be one of them. Maybe working a late night shift as a security guard would be another.

Q. Why?

A. That would bring up fatigue during their regular working hours.

Q. If an employee has to do some union organizing for IAM or someone else off site, would that be a basis on this rule to deny it?

A. No.

* * *

Q. BY MR. SCHWARTZ: So the rules talks about jobs that are inconsistent with the Company's interest, so what would be the types of jobs that would be inconsistent with the Company's interest?

A. Well, working for another customer is one. If they took a part-time job with say the Port of Toledo, we wouldn't want -- we'd be uncomfortable with that because they're a competitor. Or the example I provided, working as a nighttime security guard where their hours could potentially lead to fatigue on the job.

Q. Why would fatigue on the job be a problem?

A. Because we work in a dangerous environment where there's a lot of moving parts, and people need to be aware of their surroundings to be safe.

Q. So the cargo, type of cargo that's typically loaded and unloaded, how much would it weigh, what type of range?

A. 20-, 50-, 65,000 pounds, some heavier. We've had cargo that moves over 100,000 pounds. Very heavy things.

(Tr. 46-47) (emphasis added).

Mr. Sutka delineated, without rebuttal, legitimate reasons for the moonlighting work rule: preventing fatigue in the interest of workplace safety and preventing an employee from working for a competitor. Neither has any impact on an employee's Section 7 rights. Where Section 7

rights are implicated—performing union organizing—his unrebutted testimony is that the rule would not prohibit that type of moonlighting.

The ALJ erroneously relied upon several prior Board decisions to support her determination that the "no moonlighting" rule in this case potentially impacts Section 7 rights. The cases that the ALJ relies upon are (1) no longer binding precedent regarding the lawfulness of work rules in light of the Boeing Company, supra, holding, and (2) the rules evaluated in those cases address conflict of interest rules, not narrowly construed to outside work such as this rule. In Schwan Homes Services, Inc., 364 NLRB No. 20, Slip Op. at 6 (2016), the Board held that a rule containing the broad provision "conflicts of interest or the appearance of such conflicts" was unlawful. However, in its analysis the Board further reasoned that this was due the overbreadth of the rule, without any examples or confines, and that a reasonable employee may assume that activity such as engagement in a labor dispute would be in violation of this rule. Id. To assert that this holding provides guidance to the ALJ as to whether the contested rule has a potential impact on Section 7 rights indicates that the ALJ misconstrued the rule before her.

The other cases cited by the ALJ, First Transit, Inc., 360 NLRB 619 (2014), and Remington Lodging & Hospitality, LLC, d/b/a The Sheraton Anchorage, 362 NLRB No. 123 (2015), similarly dealt with distinctly broad provisions which are dissimilar to the at-issue rule regarding moonlighting. In Member Miscimarra's dissent in Sheraton Anchorage, supra at 6, in regard to the conflict of interest rule, he stated:

> I disagree with my colleagues' additional finding that the rule against conflicts of interest is unlawful on its face. Employers have a legitimate interest in preventing employees from maintaining a conflict of interest, whether they compete directly against the employer, exploit sensitive employer information for personal gain, or have a fiduciary interest that runs counter to the employer's enterprise. Therefore, even if one applies Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004), I do not agree with

> my colleagues' conclusion that employees would reasonably understand the conflict-of-interest rule as one that extends to employees' efforts to unionize or improve their terms or conditions of employment.

That dissent effectively was adopted by the Member Miscimarra's majority opinion in Boeing Company, supra.

The ALJ's finding that this rule has the potential to interfere with the exercise of NLRA rights is flawed. The rule is clearly established to restrict employees from working for competitors and in a way that would cause potential safety hazards while performing work for Nicholson (Tr. 46-47). Similar to the dissent in Sheraton Anchorage, supra, the Boeing Company holding overturned the Lutheran Heritage Village-Livonia holding, and established the new balancing test which should have been applied here. However, the ALJ misapplied current Board law in her interpretation of the language of the rule.

Despite the fact that the balancing test should not have even applied to this rule, because it is not a rule that is reasonably interpreted to interfere with the exercise of employee's NLRA rights, the ALJ incorrectly analyzed the rule under the balancing test. The balancing test asks what the nature and extent of the potential impact on NLRA rights is, and what the employer's legitimate justifications are for the rule. There is no potential impact on NLRA rights. The ALJ misinterprets the language of the rule to justify her finding that the potential interference with employee's NLRA rights outweighs the employer's legitimate justifications. She incorrectly asserted that the rule impacts the employees' rights to engage in a variety of protected activity that is not restricted by the rule, including engaging in organizing efforts, supporting a recognized union in a labor dispute, etc. (ALJ Decision, p. 13). Such assertions are far beyond the restrictions under the rule, therefore, the ALJ's application of the analysis is completely flawed.

Furthermore, the ALJ's analysis completely fails to address the fact that the "no moonlighting" rule is qualified to outside "work" efforts. The rule places restrictions on the employee maintaining separate employment from Nicholson, as qualified by the terminology "not have another job" in the work rule (Jt. Ex. 1, p. 17). The ALJ's analysis stated "[w]hen engaging in organizing efforts, including salting or dissenting union efforts as well as efforts supporting a recognized union in a labor dispute, employees may participate in efforts that "could be inconsistent with the [employer's] interest" or that "could have a detrimental impact" on the employer's image with customers or the public" (ALJ Decision, p. 13). In her analysis, the ALJ changed the work rule terminology "another job" and engagement in "work" and substituted the term "efforts." This is a mischaracterization of the rule, and the analysis involves a broader reading of the rule than the document itself provides.

Therefore, the ALJ's analysis involves a too broad construction of the rule, which she then incorrectly evaluates subject to the Boeing Company holding. Under the Boeing Company analysis, this rule has no potential impact on NLRA rights, because the rule is not prohibiting the employees from engaging in union activity or efforts associated with their Section 7 rights, but instead is a restriction on the employee's outside employment. Nicholson's legitimate justifications for the moonlighting work rule were clearly established in Mr. Sutka's unrebutted testimony: preventing fatigue in the interest of workplace safety and preventing an employee from working for a competitor. Neither has any impact on an employee's Section 7 rights and they are legitimate business reasons, particularly in a safety-sensitive industry.

The ALJ's finding that this "rule has a significant potential impact on substantial, core NLRA rights to organize, associate, and affiliate with other employees and participate in union

activity on nonwork time without their employer's interference" is an exaggeration of the at-issue rule, and not supported by substantial evidence and is inconsistent with the law (ALJ Dec., p. 13).

The only conceivable objection to Nicholson's rule regarding secondary employment is that it might possibly interfere with an employee working part-time for the IAM. See, e.g., Thermal Tech, 2012 WL 6085161 (N.L.R.B.G.C.) (May 16, 2012) (analysis applied under Lutheran Heritage-Livonia "reasonably construed" standard). This is an insignificant risk. Since the employees have had a collective bargaining representative for nearly six decades, there is no likelihood of any union planting a "salt" in the workforce for the purpose of union organizing (Tr. 29). Mr. Sutka testified, without rebuttal, that he would not object if any employee wanted to work part-time for the IAM, provided that the hours would not interfere with his or her productivity during the regular shift (Tr. 47). The collective bargaining agreement expressly provides for such a possibility (R. Ex. 1, p. 16) (emphasis added):

> The Company agrees to grant necessary and reasonable time off, without discrimination or loss of seniority rights and without pay, to any seniority employee designated by the Union to attend a Labor Convention or serve in any capacity on other official Union business, provided one week written notice is given to the Company by the Union specifying length of time off. The Union agrees that, in making its request for time off for Union activities, due consideration shall be given to the number of employees affected in order that there shall be no disruption on the Company's operations due to lack of available employees. Not more than one (1) employee shall be on leave at any one time. The maximum amount of any leave is two (2) years.

No evidence was presented that the moonlighting rule was established to prevent salting or was discriminately enforced. To the contrary, the application of the rule has never come up.

After the issuance of the ALJ's Decision, on June 6, 2018, General Counsel Robb issued Memorandum GC 18-04, Guidance on Handbook Rules Post-Boeing. The Memorandum provides:

I. Rules Banning Disloyalty, Nepotism, or Self-Enrichment

Rules banning these types of conflicts of interest have generally been deemed lawful even prior to *Boeing*:

- Employees may not engage in conduct that is "disloyal … competitive, or damaging to the company" such as "illegal acts in restraint of trade" or "employment with another employer."

***

Impact on NLRA Rights: The Board has historically interpreted rules banning disloyalty and blatant conflicts of interest to not have any meaningful impact on Section 7 rights.

Legitimate Justifications: Employers have a legitimate and substantial interest in preventing conflicts of interest such as nepotism, self-dealing, or maintaining a financial interest in a competitor. Such usurpation of corporate opportunities, pitting the pecuniary interest of employees against their employer's, can have a serious detrimental effect on an employer's revenue. Conflicts of interest can also undermine a company's reputation and integrity, and cause employees to doubt the fairness of personnel actions. Financial institutions, law offices, and other professional industries will likely have particularly significant reasons for avoiding these types of conflicts of interest.

Balance: Since rules banning these types of activity do not meaningfully implicate Section 7 rights, and are substantially justified by legitimate employer interests, these types of rules fall in Category 1.

Memorandum GC 18-04, p. 15 (underlined emphasis added).

The rationale provided by Nicholson, to prevent employees from working for competitors, such as the Port of Toledo, is a legitimate justification (Tr. 47). Nicholson's legitimate justification mirrors the explanation provided by General Counsel Robb in his guidance to the field offices. The at-issue rule is a Category 1 rule as advised by General Counsel Robb and therefore is lawful.

The ALJ failed to properly apply the standard established in Boeing Company, supra, and instead found that the rule was subject to the balancing test. In evaluating this rule under the balancing test, the ALJ again mistakenly analyzed the rule and misconstrued the language of the rule. Therefore, she erred in finding that this rule was an 8(a)(1) violation.

CONCLUSION

General Counsel did not prove that any of the challenged work rules in the Nicholson Personnel Handbook violate employees' Section 7 rights. Nicholson's promulgation and maintenance of the at-issue rules were agreed to by the IAM, and incorporated by reference into the parties' collective bargaining agreement (Tr. 63). To assert that these rules are violative of NLRA protected rights when the bargaining representative for the majority of the statutory employees at Nicholson found no such violations and agreed to the content of the handbook and the incorporation of the rules into their collective bargaining agreement is unfounded. The ALJ has erroneously analyzed the rules under the recent Boeing Company balancing test and failed to properly acknowledge that the rules are not violative of the employees' Section 7 rights.

Mr. Sutka's testimony established legitimate justifications, which were unrutted, for the promulgation of each of the contested work rules. The "mere maintenance" of these rules does not violate the Act, therefore, Nicholson did not violate Section 8(a)(1) of the Act. Under a common-sense theory these rules do not interfere with employees' NLRA rights, nor under the proper analysis as established in Boeing Company, supra. Had the ALJ properly applied the standard pursuant to Boeing Company, supra, this Charge would have been dismissed. The ALJ's analysis under inapplicable law to the rules at issue and failure to properly analysis under the balancing test causes an issue not just for Nicholson in its maintenance of its handbook, but has

the potential to cause issues for employers nationwide. The ALJ's decision improperly applies and misconstrues the Board's holding in Boeing Company, supra, and must be reversed.

REMEDY

Based on the preceding reasons and authority, Respondent Nicholson Terminal & Dock Company requests that the ALJ's Decision be reversed as applies to the three rules determined to be an 8(a)(1) violation, and that the relief requested by the General Counsel be denied in its entirety. Respondent also requests a finding that it did not violate the Act in any respect.

Respectfully submitted,

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Dated: June 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2018, I electronically filed the foregoing Respondent Nicholson Terminal & Dock Company's Exceptions to Decision of Administrative Law Judge and Brief in Support with the National Labor Relations Board and electronically served a copy of same on Renee D. McKinney, Board Attorney, at the email address listed below:

Renee D. McKinney, Board Attorney
Renee.McKinney@nlrb.gov

I further certify that the Charging Party was served by U.S. first class mail on June 13, 2018 as follows:

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Dated: June 13, 2018